

provided since the last determination of prequalification for that Contractor.

## SECTION 103 - AWARD AND CONTRACTING

Scope of Section This Section includes requirements related to the final determination of Bid responsiveness and Award and execution of the Contract.

### 103.1 Analysis of Bids

103.1.1 Unit Prices Govern After Bid Opening, the Department will review the mathematics of all apparently responsive Bids. In the event of a discrepancy between (A) unit and lump prices and (B) extensions and/or the total Bid Price, the unit and lumps sum prices shall govern and the total Bid Price will be adjusted accordingly.

### 103.1.2 Unbalanced Bids

A. Definitions An Unbalanced Bid is a Bid that is Mathematically Unbalanced and that may also be Materially Unbalanced. Mathematically Unbalanced means a Bid containing lump sum or Unit Prices, which do not reflect reasonable direct costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, and other indirect costs. Materially Unbalanced means a Mathematically Unbalanced Bid, which generates a reasonable doubt that said Bid, will represent the lowest ultimate cost to the Department.

B. Comparison and Possible Bid Rejection The Department will compare the price of items contained in the Bid of the Apparent Successful Bidder with the estimate prepared by the Department. If the Bid is Mathematically Unbalanced, the Department may, in its discretion, notify the Apparent Successful Bidder and request an explanation. There shall be no negotiation or changes in prices. If the Bidder fails to provide a reasonable explanation, and if the Department finds the Bid is Materially Unbalanced, the Department may reject the Bid as non-responsive and may take any action that is in the best interests of the Department including those set forth in Section 103.6 - Failure to Fulfill Award Conditions.

103.1.3 Waiver of Defects and Technicalities; Right to Reject Bids The Department reserves the right to reject any or all Bids and to advertise for new Bids if doing so is in

the best interest of the Department. The Department reserves the right to waive curable defects and other technicalities without notice to any party. Refer to section 102.11.2 for Curable Bid Defects.

103.2 Return of Bid Guaranty Bid Bonds will not be returned unless so requested. Bid Guaranties other than bonds will be returned within 7 Days following Bid Opening, except that the Bid Guaranties from two lowest responsive Bids from responsible Bidders will be retained until Contract Execution or rejection of all Bids.

### 103.3 Post-Bid Qualification

103.3.1 Notice and Information Gathering After Bid Opening and as a condition for Award of a Contract that did not require pre-Bid qualification, the Department may require an Apparent Successful Bidder that was not prequalified pursuant to the Contractor's Prequalification Procedure to demonstrate to the Department's satisfaction that the Bidder is responsible and qualified to perform the Work.

If such qualification is required, the Department will provide the Bidder with written notice to that effect. Such notice will include a brief description of the reasons why such qualifications is required, and may require the Bidder to provide any information requested in the "Contractor's Prequalification Application" form adopted by the Department.

If requested by the Bidder, the Department shall provide an opportunity for the Bidder to present evidence of qualifications at a reasonable time and place.

103.3.2 Notice of Determination After the Bidder's presentation of evidence of qualifications (if required), the Department will notify the Bidder of its determination in writing. If a determination of "Not Qualified" is rendered, the Department's Chief Engineer will send the notice, which will set forth the specific reasons therefore to the extent practical. Such reasons include the following.

- A. Default(s) or termination(s) on past or current Contracts.
- B. Failure to pay or settle all bills for labor, Materials or services on past or current Contracts.
- C. Failure to provide Closeout Documentation on past or current Contracts.

- D. Failure to fulfill warranty obligations on past or current Contracts.
- E. Failure to comply with directives of the Department on past or current Contracts.
- F. "Below Standard" performance as determined from the Department's Contractor's Performance Rating process.
- G. Inability of the Contractor to obtain or retain performance or Payment Bonds meeting MDOT requirements.
- H. Failure to accept an Award of a Contract made by the Department to the Contractor.
- I. Making materially false, deceptive, or misleading Statements or omissions, whether or not under oath, regarding a claim on prior Contracts or on the Contractor's Prequalification Application.
- J. Failure to provide information requested by the Department pursuant to this Section 103.3.
- K. Any of the reasons contained in Section 102.02 of the "Rules Regarding Debarment of Contractors", Maine Department of Transportation Register 17-229, Chapter 102 (October 2, 1985).
- L. Debarment or suspension by any federal, State, or local governmental procurement agency or the Contractor's Agreement to refrain from Bidding as part of the settlement with any such agencies.
- M. Other serious misconduct that the Department reasonably determines will substantially and adversely affect the cost, quality or timeliness of Work, or the safety of Workers or the public.

103.3.3 Appeal To appeal a "Not Qualified" determination, the Bidder must Deliver a written "Request for Appeal of Qualification Determination" to the Commissioner within 48 hours of Receipt of such determination. The Commissioner or the Commissioner's designee will grant such Requests for Appeal unless the Department reasonably determines that Delay of Award pending appeal is likely to cause substantial

harm to the interests of the Department. If the Request for Appeal is denied, the determination of "Not Qualified" is upheld and the Award process will proceed without the unqualified Bidder.

If the Request for Appeal is granted, the Bidder and the Chief Engineer must Deliver to the Commissioner or the Commissioner's designee any information or arguments that the parties want considered. within 14 Days of Receipt of a "Not Qualified" determination.

Within 14 Days of Receipt of such information and arguments, the Commissioner or the Commissioner's designee will notify the Bidder in writing as to whether: (A) the determination of "Not Qualified" is upheld, modified or reversed; or (B) the Commissioner or the Commissioner's designee elects to submit the issue to binding or non-binding alternative Dispute resolution.

After a final determination of "Not Qualified", the Bidder's Bid Guaranty will be returned and the Bidder will be ineligible to Bid on future Department Contracts until the Bidder is prequalified pursuant to the Department's Prequalification Procedure.

103.4 Notice of Award The Department has 30 Days following Bid Opening to Deliver a written Notice of Intent to Award and request a payment bond, performance bond, insurance bond, special certifications, and other information from the Apparent Low Bidder. Once these pre-execution conditions are met, the Department will execute the Contract and notify the Contractor of the award with a written Notice of Award. If a Notice of Award is not sent within 30 days of receipt of the proper bonds and insurance, the Apparent Successful Bidder may withdraw its Bid without forfeiture of its Bid Guaranty or Bidding eligibility. The Notice of Intent to Award will set forth and/or reference the conditions that the Bidder must fulfill before Contract Execution. If the Department and the Apparent Successful Bidder agree, an extension beyond the 30 days of the Bid and Bid prices may occur and the Bid remains viable. For a related provision, see Section 103.5.

103.5 Award Conditions The Apparent Successful Bidder must provide and/or perform all of the items listed in this Section 103.5 within 14 Days of Receipt of the Notice of Intent to Award. Unless indicated otherwise, all items must be Delivered to the Department's Contracts Engineer.

103.5.1 Performance and Payment Bonds Performance and Payment Bonds complying with Section 110.2.1 - Bonds.

103.5.2 Insurance Certificates Certificates of Insurance complying with Section 110.3 - Insurance.

### 103.5.3 Non-Resident Contractor Requirements

A. Definition A Non-Resident Contractor is defined as a Contractor that is: (A) any person who is not a Resident of the State of Maine, or (B) any firm, corporation, limited liability company, partnership, joint venture, sole proprietorship, or other entity which (A) is not licensed to do business within the State of Maine, or (B) does not have a principal place of business within the State of Maine.

B. Requirements If a Non-Resident Contractor, the Apparent Successful Bidder must file with the Department a copy of a written appointment of an attorney admitted to practice in the State of Maine having a place of business within the State. The appointment must: (A) set forth the attorney's business and personal addresses, and business telephone and fax numbers, (B) name said attorney to be the true and lawful attorney of the Non-Resident Contractor, (C) set forth that the Contractor agrees that any lawful process which is served on said attorney shall have the same legal force and validity as if served on the Contractor, (D) set forth that the appointment shall continue in force as long as any potential liability in any way related to the Work or the Contract remains or until the Department receives written notice of a change of appointment Conforming to this paragraph, (E) provide that service of such process may be made by leaving a copy of the process in the hands or in the office of the Resident attorney and that such service will be effective upon the Non-Resident Contractor, as if service were made in accordance with Rule 4 of the Maine Rule of Civil Procedure, and (F) provide that the Contractor expressly waives any and all defenses regarding service of process under Rule 12 of said Civil Rules or otherwise. The appointment shall be filed in the office of the Maine Secretary of State.

103.5.4 Execution of Contract By Bidder The properly completed and signed Contract Agreement, Offer, & Award form provided with the Bid constitutes the Bidder's offer. Once the Department has received the bonds, insurance, and any other pre-award items required, the Department will sign the Contract Agreement, Offer, & Award form and execute the Contract. The point of Contract execution is when the Contractor

receives the written Notice of Award.

103.5.5 Bid Escrow If required by Special Provision, the Apparent Successful Bidder must provide a legible copy of Bid Escrow Documentation and a related Affidavit Conforming to said Special Provision. Failure to provide Conforming Bid Escrow Documentation or the Affidavit constitutes a refusal to enter into the Contract and will result in the Bidder's forfeiture of its Bid Guaranty.

103.5.6 Other Conditions The Apparent Successful Bidder must comply with all other conditions set forth or referenced in the Notice of Intent to Award.

103.6 Failure to Fulfill Award Conditions Failure of the Apparent Successful Bidder to fulfill all conditions of Award within the time provided or to otherwise accept Award will result in forfeiture of the Award to the Apparent Successful Bidder and the forfeiture of the Bid Guaranty. Such Bidder will be prohibited from submitting a Bid for the Work in the event that the Work is re-advertised. Further, the Department may refuse to accept any Bid from the Bidder on any Project for a period of two years from the date of such refusal.

The Department may then take any action that the Department determines is in the best interest of the Department including Awarding the Contract to the responsible Bidder with the next lowest responsive Bid, rejecting all Bids, and/or re-advertising the Work .

103.7 Forfeiture of Award The Department reserves the right to stop the Award of any Contract at any time before the Contract Execution without liability if doing so is in the best interest of the Department. Any costs incurred by the Bidder before Contract Execution shall be the sole responsibility of the Bidder.

103.8 Execution of Contract by Department The Commissioner or the Commissioner's authorized agent will execute the Contract within 14 Days of the fulfillment of all Award Conditions. After execution by the Department, one of the original Contracts will be returned to the Contractor. If the Department fails to execute the Contract within said time, the Apparent Successful Bidder may withdraw its Bid without forfeiture of its Bid Guaranty or Bidding eligibility. For a related provision, see Section 107.2 - Commencement of Contract Time.

103.9 Computation and Extension of Time In the event that a time period provided in this Section 103 concludes on a Holiday, Saturday, or Sunday, said time period shall be extended to the next Business Day.

The Department and Apparent Successful Bidder may extend the time for the Award process, fulfillment of Award Conditions, or execution of the Contract by mutual Agreement. Unless specifically and mutually agreed to in writing, such extensions shall not extend the Contract Time or the Contract Completion Date.

## SECTION 104 - GENERAL RIGHTS AND RESPONSIBILITIES

Scope of Section This Section sets forth certain rights and responsibilities of the Department and the Contractor that are generally applicable to all Contracts. This Section is not all inclusive and additional rights and responsibilities are set forth elsewhere in the Contract.

### 104.1 General

104.1.1 Basic Roles of the Parties The Contractor has the authority and responsibility to perform all Work in Conformity with the Contract. The Department has the authority and responsibility to assure that the Contractor does so.

104.1.2 Joint Covenants of Good Faith and Fairness This Contract imposes an obligation of good faith and fair dealing on both parties in the execution, performance, interpretation, and enforcement of the Contract. With a positive commitment to honesty and integrity, the Contractor and the Department agree to function within all applicable laws, statutes, regulations, and Contract provisions; avoid hindering each other's performance; fulfill all obligations diligently; and cooperate in achievement of the intent of the Contract.

### 104.2 Department's General Authority and Responsibilities

104.2.1 Furnishing of Right-of-Way The Department will secure all necessary rights to real property within the Project Limits shown on the Right-of-Way Plans that are provided with the Bid Documents. For related provisions, see Sections 104.3.2 - Furnishing of Other Property Rights and 105.4.5 - Special Detours.